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IN THE

Supreme Court of the United States

OCTOBER TERM, ...

No. 193

STANDARD MOTOR PRODUCTS INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

DAVID M. LEVITAN,
Attorney for Petitioner,
350 Fifth Avenue,
New York 1, N. Y.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner, Standard Motor Products, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on May 4, 1959.

Opinion Below.

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 25-29) is not yet reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 4, 1959 (Appendix B, *infra*, pp. 30-31). The jurisdiction of the Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented.

(1) Whether the presumption of injury to and lessening of competition resulting from price discrimination under a quantity rebate price system is a rebuttable presumption by affirmative economic proof of an absence of injury to competition.

(2) Whether, as a matter of law, the Court of Appeals erred in rejecting petitioner's meeting competition in good faith defense under 2(b) of the Clayton Act, as amended by the Robinson-Patman Act.

Statutes Involved.

This proceeding is brought under subsection 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 USC 13(a) which, in part, provides:

> "(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

The questions presented involve a determination as to nature of the evidence required under the above quoted subsection and under section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, which provides:

> "(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Statement.

The Federal Trade Commission's complaint in this case (S. Appendix, pp. 1-5) alleged that the petitioner, Standard Motor Products Inc., a manufacturer and distributor of replacement automotive parts, discriminated in the prices which it charged its customers, who were in competition with one another and that the effect of such discrimination may be substantially to lessen competition or to injure competition.

The petitioner manufactures and sells to distributors throughout the United States automotive ignition parts and related items for replacement. The petitioner has had in effect two standard rebate contracts which form the basis of its rebates to a majority of its customers.

The contracts are known as "Distributors rebate contract" and "Master Distributors Rebate contract" both contracts provide for a system of quantity rebates as follows:

"(a) DISTRIBUTORS REBATE CONTRACT. Purchasers operating under this contract buy the Standard line of products subject to a retroactive rebate on purchase price based upon the following rebatable purchase volume, plus a cash discount of 2 percent on the value of all invoices if paid on the 10th following the month of date of shipment:

"If the net amount of the goods purchased is $1,800 per year the rebate is 3%
If the net amount of the goods purchased is $2,400 per year the rebate is 5%
If the net amount of the goods purchased is $3,600 per year the rebate is 7%
If the net amount of the goods purchased is $5,000 per year the rebate is 9%
If the net amount of the goods purchased is $6,500 per year the rebate is 11%
If the net amount of the goods purchased is $8,000 per year the rebate is 13%
If the net amount of the goods purchased is $10,000 per year the rebate is 15%."

(Comm. Exh. 18, F. App., p. 224a)

"(b) MASTER DISTRIBUTORS REBATE CONTRACT. Purchasers operating under this contract and its endorsement, buy the Standard line of products subject to a retroactive rebate on purchase price based upon the following rebatable purchase volume:

"Net purchases of $1,800, rebate is 3% advanced monthly.
Net purchases of $2,400, rebate is 3% advanced monthly plus 2% at end of year
Net purchases of $3,600, rebate is 3% advanced monthly plus 4% at end of year
Net purchases of $5,000, rebate is 3% advanced monthly plus 6% at end of year
Net purchases of $6,500, rebate is 3% advanced monthly plus 8% at end of year

Net purchases of $8,000, rebate is 3% advanced monthly plus 10% at end of year
Net purchases of $10,000, rebate is 3% advanced monthly plus 12% at end of year
Net purchases of $25,000, rebate is 3% advanced monthly plus 13% at end of year
Net purchases of $50,000, rebate is 3% advanced monthly plus 14% at end of year
Net purchases of $75,000, rebate is 3% advanced monthly plus 15% at end of year
Net purchases of $100,000, rebate is 3% advanced monthly plus 17% at end of year."

Also, that "The Manufacturer will allow the Distributor a monthly discount of 5% instead of the usual 2%. This 5% comprises the usual 2% cash discount and 3% rebate allowed in advance monthly." (Comm. Exhs. 20 and 21, F. App. pp. 226, 227.)

The petitioner also sells its products to corporate entities referred to as "Groups". In the test year, for purposes of this proceeding, of 1949, the following such "group" buying organizations were in operation:

Name	Address
Mid-South Distributors, Inc.	Memphis, Tenn.
Warehouse Distributors, Inc.	Atlanta, Ga.
Automotive Parts Distributors, Inc. (now National Parts Warehouse)	Athens, Ga.
Ark-La-Tex Warehouse Distributors, Inc.	Marshall, Tex.
Automotive Southwest, Inc.	Dallas, Tex.
Southwestern Warehouse Distributors, Inc.	Dallas, Tex. (S. App. p. 58

The groups were organized by distributors of automotive replacement parts and included from nine (9) to twenty-one (21) distributors. The "group" placed orders for drop shipments to each of its members and assumed the responsibility for and paid to the petitioner for all shipments to its members. In the record year, the gross billing to

"groups" varied from $17,754.27 to $306,433.95 and the discounts to the groups varied from 8.10% to 20%. The central offices of the "groups" financed their internal operations from the discounts which they received and distributed to their members a substantial share of the remaining discount funds.

The record does not establish the exact percentage of the discounts turned over by the groups to its members.

Both groups members and non-group members operated in the same general areas and in competition with one another.

At the close of the administrative proceedings, the Hearing Examiner on May 29, 1957, filed his initial decision (S. App. pp. 54-69) in which he found that the petitioner was in violation of subsection 2(a) of the Clayton Act, as amended by the Robinson-Patman Act and ordered the petitioner to cease and desist from discriminating in the price of its products. Specifically the Hearing Examiner concluded that the petitioner's retroactive volume rebate plan has resulted in general widespread and substantial price differences between its customers both among non-group members and between group and non-group members; that the effect of such discrimination may be to substantially lessen, injure, or prevent competition; and, that the discounts granted to the groups were not granted in good faith to meet an equally low price of a competitor. But that the discounts given to the groups were used instead as a weapon to obtain new customers at the expense of its seller competitors.

The findings, conclusions, and order contained in the initial decision of the Hearing Examiner were formally adopted on December 27, 1957 as the findings, conclusion and order of the Commission (S. App., pp. 70-87).

The petitioner petitioned to the Court of Appeals for the Second Circuit to review and set aside the order of the Commission. The Court of Appeals, on April 15, 1959, affirmed the Commission's order (Appendix A, *infra*, pp. 25-29) and the judgment of the Court of Appeals was entered on May 4, 1959 (Appendix B, *infra*, pp. 30-31).

Before the Court of Appeals (as well as before the Hearing Examiner and the Commission) the petitioner raised these issues.

1. That the record failed to sustain a finding of competition among purchasers receiving rebates under the petitioner's contracts, that is between non-group purchasers;

2. That the record failed to sustain and the petitioner's affirmative data rebutted a finding of injury to or lessening of competition among petitioner's purchasers; and

3. That the Commission erred in rejecting the petitioner's defense under subsection 2(b) of the Clayton Act as amended by the Robinson-Patman Act.

With respect to the conclusion of injury to competition petitioner argued that the record, most liberally construed, includes but an isolated instance of any competitive relationship among petitioner's non-group purchasers under the rebate contracts; and that the record is not only devoid of any showing of injury to or a lessening of competition among any of petitioner's purchasers but on the contrary the petitioner's detailed affirmative data, using standard economic indices, showed economic growth and financial well being among the petitioner's purchasers.

The sole basis for the findings of injury to competition is an alleged "mathematical fact" or "mathematical calculation" and admissions on cross examination by some of petitioner's purchasers, after substantial badgering by Counsel for the Commission, that they would be glad to have

gotten extra money or made more profits. They agreed that it would be nice to get some extra money.

With respect to the 2(b) defense the petitioner at all times argued that its prices to the "groups" were prices negotiated with each group and granted in each instance in good faith to meet an equally low price of a competitor. The principal ground for the rejection of this defense was that the petitioner continued its prices to the various groups not only to retain its customers who were the original "group" members but continued the particular special discounts to the groups after the "groups" included new members who had not been petitioner's customers and that it gained new customers through the special discounts.

Reasons for Granting the Writ.

The petitioner respectfully submits that the Court below perpetuated an erroneous interpretation of Subsection 2(a) of the Robinson-Patman Act, in that it, in effect, held that price discrimination establishes an irrebuttable presumption of injury to competition. The decision of the Court of Appeals raises important questions with respect to the administration of the Robinson-Patman Act which should be passed upon by this Court.

Beginning with the initial decision of the Hearing Examiner and throughout the proceeding, the Hearing Examiner, the Commission and the Court below appeared to have been guided by an interpretation that a quantity discount pricing system must necessarily produce injury to or a lessening of competition. The Hearing Examiner in disposing of the testimony of the competitors of the so called favored "group" purchasers that they had not been injured stated:

> "In so testifying as to the absence of injury, these witnesses were attempting, by conclusion, to deny a mathematical fact, . . ." (S. App., p. 68).

The Commission in its decision too disposed of this question by stating:

> "It is a matter of mathematical calculation." (S. App., p. 76).

The trial examiner, the Commission and the Court below appear not only to have deemed a special rule of evidence applicable to the proof of the existence of and injury to competition in quantity discount pricing situations, but that a quantity discount pricing system was *per se* illegal.

This *per se* approach is demonstrated by the findings of the competition required by subsection 2(a) among non-group member customers who purchased under the rebate contracts. (The petitioner concedes of the existence of competition between "group" and "non-group" customers, but as to this the petitioner claims a 2(b) defense *infra*, p. 18.) Although the Commission's agents made a prolonged and detailed examination of the petitioner's books and records, and reviewed all its sales, it introduced as part of the *prima facie* case one possible instance of such competition—that between Adams Supply Company and Ryan Supply Company in Meridian, Mississippi. (F. App., p. 75a and Commission's exhibits 338A and B, pp. 249a and 250a. Weatherall Auto Supply and Waggener Auto Parts, are also shown on the Commission's exhibits 338A and B, F. App., pp. 249a and 250a, but they sold only petitioner's Hygrade line of products and this was eliminated from this proceeding, S. App., p. 56. Exhibit 338A also lists, Benning Auto Parts Co. and Satloff Auto Parts,

Columbus, Georgia, as non-group purchasers, but they were not part of Commission's *prima facie* case.) Such evidence hardly warrants a finding of competition among its rebate contract customers.

The *per se* approach also dominates the "injury to competition" finding. In rebuttal of the Commission's *prima facie* case of injury to or lessening of competition among its customers the petitioner introduced 15 disinterested witnesses who testified that they had not been injured and that there existed brisk and keen competition in the automotive replacement parts business in their respective areas.

The petitioner did not rest merely with the conclusions of the witnesses that they were not injured but it submitted affirmative economic proof relating to the profits of competitor purchasers, their ability to have a larger store, more salesmen, more branches, render more service, carry larger and more varied stocks and generally of growth and economic well being. The petitioner took evidence in each locality set forth in Commission's exhibit 340 (S. App., p. 252a) wherein the Commission made a comparison between the "group" member, who was the alleged favored customer, and the customer buying under the volume rebate contract.

In all but one of these localities the evidence established that the dollar volume of the business of the customer alleged to have been discriminated against increased at a greater rate than did the volume of the business of the alleged favored customer; that the alleged favored customer did not render any additional services; that in many instances the customers alleged to have been discriminated against, in fact, rendered services which were not rendered by the alleged favored customer; that the alleged favored customer did not have a better store or more branches than the customers alleged to have been discriminated against; that the alleged favored customer did

not employ more salesmen, nor carry a larger or more varied stock than did the customer alleged to have been discriminated against. Indeed, in many cases, the evidence showed that the customer alleged to have been discriminated against carried larger and more varied stock, employed more salesmen and rendered more services than did the alleged favored customer.

The injury contemplated by the Act is a lessening of competition which will result in injury to the public by depriving it of an opportunity to pick, choose or select the person or place from which it will make its purchases. The injury contemplated is not that one merchant may accumulate more dollars or live better than another. The evidence in this case shows no lessening of competition in the areas selected by the Commission. It shows the customers alleged to have been discriminated against enjoyed strong and vigorous growth and as indeed they should on the basis of the profit margin on petitioner's products. Witness Fife testified (S. App., p. 271) that on the resale of petitioner's merchandise, purchased without rebate, a distributor derived a gross profit of 33% and normally a net profit of 8%.

In the initial Decision, the hearing examiner stated:

> "The competitive opportunities of certain purchasers were injured when they had to pay substantially more for respondent's products than their competitors had to pay";

and that such differentials are prohibited

> ". . . if they may substantially lessen, injure, destroy or prevent competition" (S. App., pp. 67, 68).

Such conclusions are grounded on "facts" such as the following and disregard petitioner's affirmative evidence of lack of injury:

(a) Wholesale Auto Parts of Charlotte, North Carolina, which purchased $41,722 of petitioner's merchandise was allegedly injured when its competitor Southern Bearings and Parts which purchased only $3,678 of petitioner's merchandise received a larger percentage rebate. The former received $5,822 and the latter a theoretical rebate of $677. The words "theoretical rebate" are used for the reason that the Commission's charts ascribe a full 20% rebate to Southern Bearings and Parts without an actual accounting of the actual discount it received from its "group";

(b) C & B Parts Service Co., Columbus, Georgia, had a gross billing of $19.44 (nineteen dollars and forty four cents) and its competitors who were "injured" purchased $2,952 and $2,314 respectively. The favored "group" customer had a theoretical rebate of 95 cents (less "group" expenses);

(c) Auto Parts & Electric Co., Statesville, North Carolina, the alleged non-favored customer made purchases in the sum of $10,131 and obtained a rebate of $1,373, while the alleged "favored" customer, Southern Bearing and Parts, purchased $1,199 and its theoretical rebate was $219 (less "group" expenses).

A substantially similar degree of absurd "injury to competition" is demonstrated in the Commission's chart with reference to the competition in Selma, Alabama, and Winston-Salem, North Carolina (Comm. Exh. 340, F. App. 252a).

The lack of competitive injury was further illustrated by the chart below showing a comparison between the remaining competitors listed on Commission's exhibit 340 (F. App. p. 252a) and in the initial decision (S. App. pp. 63 and 64). It will be observed that with one exception, the alleged "non-favored" purchaser outstripped his competitor in the growth of business.

GROWTH AND SALES COMPARISON WHERE THE DOLLAR AMOUNT OF CASH DISCOUNT AND REBATE GRANTED TO INDEPENDENT DISTRIBUTORS IS LOWER THAN THE CASH DISCOUNT AND REBATE THEORETICALLY AVAILABLE TO THE GROUP MEMBER OR STOCKHOLDER

Competitors—Location	Cash Discount and Rebate—1949 (From Comm. Exh. 340)	Sales Comparison* 1949	Sales Comparison* 1950	Percentage Increase of Growth: Group Member	Percentage Increase of Growth: Independent
BURLINGTON, N. C.					
Motor Bearing & Parts	$ 287.97	$ 1,193 (Tr. 1850)	$ 1,780 (Tr. 1850)	49.1	
Norton Russ Auto. Co.	85.41	1,831 (Tr. 1884)	3,700 (Tr. 1884)		102.
HIGH POINT, N. C.					
Southern Bearings & Parts	176.76	855 (Tr. 1838)	434 (Tr. 1838)	—49.3	
Collins Auto Supply Co.	39.59	876 (Tr. 1906)	1,500 (Tr. 1906)		71.2
ROCKINGHAM, N. C.					
Southern Bearings & Parts	216.35	1,100 (Exh. 340)	527 (Tr. 1839)	—52	
Smith Auto. Parts	90.95	2,126 (Tr. 1889)	2,246 (Tr. 1889)		5.6
CHARLESTON, S. C.					
H. Stenken & Co.	1,851.68	9,103 (Exh. 340)	No testimony	—	
C. D. Franke & Co.	158.63	2,468 (Exh. 340)	A little more (Tr. 1933)		+
GREENVILLE, S. C.					
Scurry & Nixon	1,805.84	8,713 (Exh. 340)	No testimony	—	
Kaufman Bros.	1,204.98	8,693 (Tr. 1920)	Same as 1949 (Tr. 1920)		—
		1949	1946		
JACKSON, MISS.					
Robinson Bros.	2,519.70	12,113 (Tr. 928)	5,955 (Tr. 928)	103.	
Ryan Supply Co.	1,574.24	10,222 (Tr. 922)	6,576 (Tr. 922)		55.4
MERIDIAN, MISS.					
Motor Supply Co.	834.62	8,807 (Tr. 956)	8,156 (Tr. 955)	.08	
Adams Supply Co.	531.65	5,274 (Exh. 340)	2,187 (Tr. 963)		141.
KNOXVILLE, TENN.					
Tenn. Mill & Mine Supply	3,779.66	18,499 (Tr. 1021)	29,645 (Tr. 1021)	—60	
Service Auto Parts Co.	3,884.66	24,154 (Tr. 587)	10,590 (Tr. 1031)		128

* Comparison is made between the years 1949 and 1950 for the reason that the groups to which the members belong were not organized for business prior to 1949; where the groups were organized prior to 1949, the comparison is made between the years 1949 and 1946.

This chart does not make a comparison between the independent and the group member in the cities of Selma, Alabama, Charlotte, Statesville and Winston-Salem in North Carolina, and Columbus, Georgia for the reason that the independent jobber in each case received a larger dollar amount of cash discount and rebate.

It is true that the statute speaks of injury to competition, and not competitors. The best safeguard for healthy competition is the existence of flourishing competitors.

It is evident from the above that the Hearing Examiner found injury among non-group customers where there was none. The percentages offered by the Commission and the Hearing Examiner go no further than to show that if the so-called non-favored purchaser had received the same percentage of rebate theoretically granted the favored purchaser, he would have obtained his goods at a lesser price. The discounts granted to the "group" buying organizations are admitted by petitioner. But the Commission claims an injury as between the independent purchaser and the "group" member purchaser and "proves" it with the discount granted the "group". No evidence was offered of the net discount to the "group" members. Such are the "facts" on which the Commission's case rests.

Granted that under recent decisions of this Court, the Commission's *prima-facie* case need only show that there is a reasonable probability or even possibility that the price differentials may have an adverse effect on competition, *Corn Products Co.* v. *Federal Trade Commission*, 324 U. S. 726, 742, and *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 38, 46, and that proof of such probable effect is established by a showing that the seller had charged one purchaser a higher price than competitor purchaser. Nor is petitioner unmindful that in a series of price discrimination cases under the Robinson-Patman Act, the Commission has found and this Court has affirmed that any substantial price differential between competing purchasers is sufficient to establish the statutory requisite of probable competitive injury. In *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, this Court found that a differential of less than 4% substantial and suffi-

cient to support a finding of competitive injury. In *Corn Products Co.* v. *Federal Trade Commission*, 324 U. S. 726, even a differential of 2% was deemed sufficient; in *Federal Trade Commission* v. *Ruberoid Co.*, 343 U. S. 470, 5% was sufficient, and in the *Automotive Replacement Parts* cases differentials of less than 5% were held sufficient. *Moog Industries* v. *Federal Trade Commission*, 238 F. 2d 43 (8 Cir., 1956) affirmed 355 U. S. 411; *Edelman & Co.* v. *Federal Trade Commission*, 239 Fed. 152 (7 Cir., 1956), cert. denied 355 U. S. 941; *Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253 (7 Cir., 1956), cert. denied, 353 U. S. 938; *C. E. Nichoff & Co.* v. *Federal Trade Commission*, 241 F. 2d 37 (7 Cir., 1957) modified 355 U. S. 941.

This Court has also said that certain "Practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be . . . illegal," *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1, 5. Such practices are in effect illegal *per se* and all that the prosecution need show is the existence of the practices.

Yet, it is firmly established law that the competitor status must be established by *substantial* evidence; that quantity discounts are not *per se* illegal; and that a seller may rebut the presumption of injury.

"Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229. In *Minneapolis Honeywell Regulator Co.* v. *Federal Trade Commission*, 191 F. 2d 786, 790, (7 Cir. 1951) the Court said "And we construe the Act to require substantial not trivial or sporadic interference with competition to establish violation of its mandate".

Quantity discounts have never been held to be illegal *per se*. "Certainly it is that quantity discounts are not *per se* illegal or condemned by the anti-trust statutes." *American Can Co.* v. *Bruce's Juices Inc.*, 187 F. 2d 919 (5 Cir. 1951). Nor is it amiss to point out that in *American Can* v. *Bruce's Juices, supra*, the discount system excluded 98% of the customers from qualifying for any discount. Yet the Court merely said that such a system "imposes a heavy duty on its proponent to justify its continuing existence." *American Can Co.* v. *Bruce's Juices, supra.*

In *Simplicity Pattern Co. Inc.* v. *Federal Trade Commission*, decided June 8, 1959, this Court reaffirmed that section 2(a) not only requires proof of a *prima facie* violation, but that a 2(a) violation has "built-in defensive matter." The petitioner concedes that a quantity rebate system is *prima facie* proof of price discrimination. Even assuming that under a non-exclusive distribution system, injury to competition will, as a matter of law, initially be attributed in such a situation and that, therefore, both of the ingredients for a 2(a) violation will be deemed present. Yet convincing proof of the absence of injury, of the kind presented by petitioner, should rebut the presumption. Petitioner respectfully submits that under the "mathematical fact" approach, the presumption of a 2(a) violation erroneously became an unrebuttable presumption.

Not only is a quantity discount pricing system not illegal *per se*, but it is submitted that it would be legal even if it results in competitive injury, if the highest bracket is within the purchasing range of the average purchaser, *Matter of Kraft-Phenix Cheese Corp.*, 25 Federal Trade Commission 537 (1937); *Matter of American Optical Co.*, 28 Federal Trade Commission 169 (1939); Austin, Price Discrimination, *Am. Law Institute 1953*, 21. In this connection there is

nothing in the record to show that petitioner's independent customers could not have joined one of the groups and availed themselves of maximum discounts. It therefore cannot be said that petitioner's highest discount was not within the reach of the average purchaser, *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 54.

Also, there is little question that where the seller can show that his price differentials have not affected competition and are not likely to have that result (not merely that the favored customer did not use his price advantage) that such proof will rebut the *prima facie* case of injury. *Federal Trade Commission* v. *Standard Brands*, 189 F. 2d 510, 515. This must be so for there cannot be a more complete defense for any challenged act than the fact that the act did not result in the allegedly adverse consequences which is the premise of the original charge.

It is respectfully submitted that the foundation for the decisions by the Hearing Examiner, the Commission and Court below is a freezing of a rule of procedure, that in quantity discount price situations proof of injury to competition was not a required element of the prosecution's burden of proof, into a substantive rule that proof of absence of competitive injury is absolutely irrelevant as a matter of law. The basis of this error may perhaps be traced to this Court's "self-evident" language in *Federal Trade Commission* v. *Morton Salt*, 334 U. S. 37, 50 (1948). See also *Corn Products Refining Co.* v. *Federal Trade Commission*, 144 F. 2d 211 (7 Cir. 1946), *Moss Inc.* v. *Federal Trade Commission*, 148 F. 2d 378, 379 (2 Cir. 1945), *Federal Trade Commission* v. *The Cement Institute*, 333 U. S. 683, 721, and *Federal Trade Commission* v. *Standard Brands Inc.*, 189 F. 2d 510, 515 (2 Cir. 1951). This we submit is the meaning of the "mathematical fact" language of the Hear-

ing Examiner (S. App. p. 68) and of the Commission (S. App. p. 76). Thus viewed a failure to establish by "ordinary" rules of evidence a competitive relationship between non-group customers, the only ones subject to the quantity rebate pricing system, is not fatal to the Commission's case. But this theory, the petitioner submits, does not afford a solid foundation. *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U. S. 61, 70, and, the procedural presumption, "mathematical facts" and "mathematical calculations" should have been, as a matter of law, shaped by realities of the case at hand.

This case, petitioner respectfully submits, also raises a question as to the proper interpretation and application of the "meeting competition" defense under 2(b) of the Robinson-Patman Act.

The common thread for the denial by the Hearing Examiner, the Commission and the Court below of petitioner's "meeting competition" 2(b) defense is that "group" members who joined the groups at any time after the petitioner had negotiated its discount arrangement to meet the then offer to the groups by its competitors, that these new "group" members received the benefit of the prices negotiated with the original "group" and, whereas, the original "group" members had been principally customers of petitioner whom the petitioner's competitors sought to recruit by their price offers, in 1949, the "test" year for these proceedings, some of the "groups" included substantially more purchasers who had not been customers of petitioner. So that, on its face, as to these new "group" members petitioner was not meeting competition in order to hold a customer. The Hearing Examiner stated his rejection of the petitioner's 2(b) defense thus:

> "The discounts and rebates so allowed were not granted in good faith to meet an equally low price

of a competitor, but instead were used as a weapon to obtain new customers at the expense of its seller competitors and not to hold existing customers" (S. App., pp. 65-66).

The Commission in its opinion stated:

> "Second, the operation of the system was not limited to retaining customers who had been offered a better price. Through the operation of discriminating prices, it in fact secured new customers as is shown by the record" (S. App., p. 83).

The Court below stated:

> "That a lowered price is within section 2(b) . . . only if it is used defensively to hold customers rather than to gain new ones . . . and the record is also clear that petitioner gained many new customers through the buying groups with which it dealt" (App. A., *infra*, p. 29).

The record is clear that the buying "groups" had increased in membership from the time of the original negotiation of the discount by the petitioner with each "group"; but the record is completely devoid of any proof that petitioner solicited any seller of automotive parts to join any "group" or that any new member joined any "group" because of petitioner's prices to the "group." The facts are that petitioner had no control over the "group" membership and simply honored any order from any customer certified by a "group" to be a member and which came in on a "group" order blank. Petitioner continued to deal, at all times, with the elected officers and employees of the "groups" which were duly organized corporations under the laws of various states. The corporate entities, composed initially primarily of petitioner's customers, negoti-

ated with petitioner and determined their membership or stockholders. There would appear no reason for holding that a seller can continue to meet the lower price of a competitor even though the purchaser's volume increases, but that the petitioner could not sell at the lower price to the whole "group" when its membership increased. The addition of new members is but another form of volume increase.

The record is clear that the seller had no control as to the purchasers who would avail themselves of "group" membership and that its price offer was to the "group" not to individual members, although the initial basis for the petitioner's price to the "group" was to retain its long established customers.

Each of the so-called "groups" were corporations formed under the laws of their respective states. The distributors who became members of the "groups" were in the position of stockholders where the corporation was a stock corporation or members where the corporation was a membership corporation or a cooperative. After the corporation was formed it undertook to buy the requirements of its jobber members.

Each member would order merchandise from petitioner on an order blank of the corporation. Petitioner would ship the merchandise to the member's place of business. Petitioner was paid for the merchandise in the following manner. At the end of the month, petitioner would bill the corporation for all of the merchandise shipped to its members and with the bill was enclosed a memorandum or invoice showing merchandise shipped to each member during the month. Each member would remit to the corporation the amount of the invoice for the merchandise shipped to it less the 2% cash discount. The corporation would remit the amount of petitioner's bill less the 2% cash discount and

less the discount agreed upon between petitioner and the corporation. From the monies which the corporation would accumulate by the difference between the amount remitted to it by its members and the amount which it spent for its operations and the money remitted to petitioner, a distribution was made to the members in proportion to each member's purchases. Once the corporation was formed and a line of merchandise was approved by the corporation, the purchases from petitioner were for and in the name of the corporation or "group". The individual distributor who became a member of the corporation ceased to buy the line as an individual purchaser.

At the time each of the "groups" was formed, distributors who were then customers of petitioner, formed the nucleus of the respective "groups". At that time they were buying petitioner's merchandise under the provisions of one of the two contracts referred to above (*supra*, p. 4). In each instance at the time of the formation of the "group" a competitor or competitors of petitioner approached the "group" and offered to sell it, or through it, to sell its members their merchandise at prices lower than the price at which petitioner was selling its merchandise to its customers who were about to become members of the "group". In each instance petitioner's customers reported to petitioner that its competitors were offering to sell their merchandise at a lower price, they told petitioner what that lower price was, urged petitioner to meet that lower price, and threatened that if it did not do so it would lose their business. As these customers were about to become members of the various "groups", petitioner could not offer the lower price to them directly but had to make that offer to the "group" and through the "group" to the distributors who had been its customers. In each instance where this reported lower price and threat to

discontinue business unless the lower price were met, was reported to petitioner, its management considered petitioner's position, its competitor's offer, and authorized one of its sales representatives to make an offer to its customers through the "group" in order to retain its customer's business. It could retain its customers only through such "group" offers.

In some instances petitioner's price was higher, in some it was equal to, in no case was it lower than the prices offered by its competitors to the various "groups". This brings petitioner even within the more stringent test, as to the circumstances under which the 2(b) defense will be allowed, *Moss, Inc.* v. *Federal Trade Commission*, 148 F. 2d 378, 380. The record in the instant cases shows protracted negotiations between petitioner and the "group" officers, where petitioner's competitors were offering a discount of 20% and petitioner offered a discount of 15% and in order to retain the business of its old customers, was forced to offer a discount of 20%. (Mid-South Distributors Inc., S. App., pp. 93-95, 141, 142; Midwest Warehouse Distributors, Inc., S. App. p. 101; Warehouse Distributors, Inc., S. App. p. 99.)

The record shows that each of these "groups" bought at a negotiated price (S. App., pp. 92-95, 98-101, 103-104, 105-120, 136-144, 148, 150, 152-153, 166-171, 172-174, 178-180, 189-191, 195-197, 201-202, 207-208, 210-211, 222-224, 226-227, 229-230, 262-267). That none of the "groups" bought pursuant to the provisions of the distributors rebate contract or the master distributors rebate contract. The fact that none of the "groups" received a year end rebate as provided in the specimen contracts and each "group" had its full discount deducted from the face of the monthly invoices is further proof that those "group" sales were not under the normal contracts.

Each "group" negotiation was an individual buying situation and the Commission's own Exhibit No. 337 (F. App. 248A) shows on its face that the price to the "groups" was not an extension of petitioner's rebate contracts. For example: Warehouse Distributors Inc. received a 20% discount on $83,716.44 of net purchases but under the petitioner's contracts it would have been entitled to a rebate of 3% advanced monthly and a year end rebate of 15%.

Automotive Southern Inc. received a discount of 14.82% on $27,942.27 of net purchases but under petitioner's contracts it would have been entitled to a rebate of 3% advanced monthly and a year end rebate of 13%.

These and similar discrepancies further confirm that the original prices to the original "groups" were individually negotiated to meet the lower prices of competitors and covered by the 2(b) defense. Since the original offers were for the purpose of meeting lower price offers by petitioner's competitors to petitioner's customers, the extension of the price to new customers should be treated no different than the case of a volume increase by an established customer. The petitioner's prices to each group were not a "method" of pricing, a "policy" or a "system" of pricing, *Standard Oil Co.* v. *Federal Trade Commission*, 233 F. 2d 649, 653.

It was in each instance a negotiated price and is outside of the "pricing system" ban laid down in *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U. S. 746, 753, 760, *Federal Trade Commission* v. *The Cement Institute*, 333 U. S. 683, 725, *Federal Trade Commission* v. *National Lead Co.*, 352 U. S. 419. The facts bring it squarely within this Court's decision in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231, 242, 250; 355 U. S. 396 and *Standard Oil Co.* v. *Brown*, 238 F. 2d 54, 57, 58, (5 Cir. 1956). Petitioner as a matter of business survival in order to retain

its customers who had organized into "groups" and were about to be lured away, reluctantly and in good faith met the price offered by its competitors and its 2(b) defense should have been sustained as to the price discrimination between the "group" and non-group purchasers.

Conclusion.

For the reasons stated herein, it is respectfully submitted that this petition for a writ of certiorari should be granted.

David M. Levitan,
350 Fifth Avenue,
New York, N. Y.,
Attorney for Petitioner.

Appendix A

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 88—October Term, 1958.

(Argued February 5, 1959 Decided April 15, 1959.)

Docket No. 25091

STANDARD MOTOR PRODUCTS, INC.,

Petitioner,

—v.—

FEDERAL TRADE COMMISSION,

Respondent.

Before:

CLARK, Chief Judge,

MADDEN, Judge, United States Court of Claims,*

and HINCKS, Circuit Judge.

On Petition to Review an Order of the Federal Trade Commission.

Standard Motor Products, Inc., petitions to review and set aside a cease and desist order of the Federal Trade Commission. Order affirmed.

EDWARD S. ST. JOHN, New York City (Thomas P. Dougherty, New York City, on the brief), for petitioner.

JAMES E. CORKEY, Asst. Gen. Counsel, Federal Trade Commission, Washington, D. C. (Earl W. Kintner, Gen. Counsel, and Francis C. Mayer and Edwin S. Rockefeller, Attys., Federal Trade Commission, Washington, D. C., on the brief), for respondent.

* Sitting by designation pursuant to the provisions of 28 U. S. C. §291(a).

CLARK, Chief Judge:

This proceeding brings for review an order of the Federal Trade Commission directing the petitioner, Standard Motor Products, Inc., to cease and desist from discriminating in the net sale prices of its products in violation of §2(a) of the Robinson-Patman Act, 15 U. S. C. §13(a). The Commission's order is directed against Standard's practices of making rebates to its distributors based on volume sales. Standard's pricing practices here in question are closely similar to those of other manufacturers of replacement auto parts, and this case is one of several instituted by the Commission throughout the industry.[1]

Standard manufactures and sells to distributors throughout the United States automotive ignition parts and related items for replacement purposes. These distributors do not have exclusive territories, but compete with other dealers within a fifty-mile or larger radius in the resale of petitioner's products. The majority of petitioner's customers buy from it under one of its two standard rebate contracts, which each grant the distributor a percentage rebate of the list price of the purchased articles, varying with the net amount of its purchases in the calendar year from nothing at all for purchases totaling less than $1,800 to a maximum of 20% of list price where the distributor's annual purchases are more than $100,000. In addition, petitioner sells a substantial portion of its output to distributors who have joined together in co-operative buying groups. These distributors order and receive shipments direct from Standard exactly as if they did not belong to a buying group:

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[1] See *Moog Industries, Inc.* v. *F. T. C.*, 8 Cir., 238 F. 2d 43 affirmed 355 U. S. 411; *C. E. Nichoff & Co.* v. *F. T. C.*, 7 Cir., 241 F. 2d 37, modified *F. T. C.* v. *C. E. Nichoff & Co.*, 355 U. S. 411; *P. Sorensen Mfg. Co.* v. *F. T. C.*, D. C. Cir., 246 F. 2d 687; *P. & D. Mfg. Co.* v. *F. T. C.*, 7 Cir., 245 F. 2d 281, certiorari denied 355 U. S. 884; *E. Edelmann & Co.* v. *F. T. C.*, 7 Cir., 239 F. 2d 152, certiorari denied 355 U. S. 941; *Whitaker Cable Corp.* v. *F. T. C.*, 7 Cir., 239 F. 2d 253, certiorari denied 353 U. S. 938; *In the Matter of Guaranteed Parts Co.*, F. T. C. Docket 6987; and cases cited note 2 *infra*.

but payments, made through the group office, are for list price, less a percentage discount equivalent to the rebate allowed under petitioner's uniform contracts for annual purchases equal to the aggregate purchases of the group. The proof before the trial examiner showed, as is apparent from the above facts, that in many instances competing distributors in effect buy petitioner's products at different net prices. Both the hearing and the Commission concluded that these pricing practices violated the Robinson-Patman Act.

The conditions in the replacement auto parts industry disclosed by the record here seem precisely those which the Robinson-Patman Act was intended to eliminate. The statute was enacted in direct response to the growth of a few nationwide chain store corporations in the 1920's and 1930's. It is evident from the legislative history that Congress sought to curtail the concentration of economic power in the distributive area of the economy by eliminating inequalities derived from sheer economic power, while at the same time not stifling competition based on real cost savings and increased efficiency. H. R. Rep. No. 2287, 74th Cong., 2d Sess. 6-7; Sen. Rep. No. 1502, 74th Cong., 2d Sess. 3. See also F. T. C., Final Report on the Chain Store Investigation (1934); Sen. Res. 224, 70th Cong., 1st Sess., 69 Cong. Rec. 7857 (1928). The volume discounts here—which relate to the amount of the customer's total annual purchases, and not to individual sales—do not reflect any cost savings which might accrue to petitioner on large individual orders, but merely benefit the more powerful purchasers in the industry. And the buying groups brought into being by the widespread use of these discounts make no improvement in the efficiency or real cost of distributing auto parts to the public, but, as is clear from the testimony of Standard's own witnesses, function entirely through their aggregate buying power.

On this petition to review petitioner vigorously attacks the Commission's finding that its pricing activities have an unlawful effect on competition in distributors' resale of its

products. It stresses the testimony of many of its distributors that they never lost sales because of having to pay a higher price than competitors paid for Standard's products and emphasizes its proof of several competitive situations where a distributor paying a higher net price than its competitors nevertheless maintained a more prosperous and more rapidly expanding business. The statute, however, speaks of effects on competition—not on competitors—and substantially probable, rather than actual, effects are all that it requires: It prohibits all price discriminations "where the effect of such discrimination *may be* substantially to lessen *competition* or *tend* to create a monopoly in any line of commerce, or to injure, destroy, or prevent *competition* with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U. S. C. §13(a). (Emphasis supplied.) It is clear that petitioner's varying volume rebate schedules and the similar practices of other manufacturers in the industry have been a substantial factor in the formation of the distributor's joint purchasing groups. And, as petitioner readily acknowledges, competition as to price in the resale of its products is presently all but completely nonexistent because distributors consistently follow manufacturers' suggested resale price lists. It is apparent, in view of this clear evidence of the distributors' competitive mood, that the growth of joint purchasing groups among the distributors can tend only further to lessen competition,[2] and petitioner's pricing practices may well foster this tendency. In short, we have here not the bare minimum prima facie case held sufficient in *F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37, 1 A. L. R. 2d 260, and *Samuel H. Moss, Inc.* v. *F. T. C.*, 2 Cir., 148 F 2d 378, certiorari

[2] These buying groups have themselves been the subject of Commission proceedings. *In the Matter of Warehouse Distributors, Inc.*, F. T. C. Docket 6837; *In the Matter of Mid-West Warehouse Distributors, Inc.*, F. T. C. Docket 6888; *In the Matter of Metropolitan Automotive Wholesalers Cooperative, Inc.*, F. T. C. Docket 5724.

denied 326 U. S. 734, but rather an industry-wide pricing system with decided anticompetitive tendencies. Cf. *F. T. C. v. Cement Institute*, 333 U. S. 683, 721-726; *F. T. C. v. A. E. Staley Mfg. Co.*, 324 U. S. 746; *Corn Products Refining Co. v. F. T. C.*, 324 U. S. 726. Whatever conflict may occasionally arise between the Robinson-Patman Act and more fundamental antitrust goals, cf. *Automatic Canteen Co. of America v. F. T. C.*, 346 U. S. 61, 74; *Standard Oil Co. v. F. T. C.*, 340 U. S. 231, 249, we perceive none in the Commission's action in this case.

Petitioner also seeks to avail itself of the affirmative defense provided in §2(b) of the Act, 15 U. S. C. §13(b), which exempts differences in price made in good faith to meet an equally low price offered the favored purchaser by a competitor. As this defense is made only as to its sales to joint purchasing groups, the Commission's order must stand in any event, since the standard distributor contracts have themselves been shown to result in discriminations in price which may lessen competition. Moreover, it is well settled that a lowered price is within §2(b) only if it is made in response to an individual competitive demand, and not as part of the seller's pricing system, *F. T. C. v. Cement Institute, supra*, 333 U. S. 683, 721-726; *F. T. C. v. A. E. Staley Mfg. Co., supra*, 324 U. S. 746, and only if it is used defensively to hold customers rather than to gain new ones. *Standard Oil Co. v. F. T. C.*, 340 U. S. 231, 249-250. The testimony of petitioner's own vice president belies its assertion here that net prices paid by a buying group were always individually negotiated, and not merely an outgrowth of its standard distributor contracts; and the record is also clear that petitioner gained many new customers through the buying groups with which it dealt. Hence the Commission's rejection of Standard's claim under §2(b) is supported by substantial evidence.

We see no further merit in petitioner's contentions. Nor do we deem it necessary or useful to entertain its motion to strike portions of the Commission's and its own appendices.

Order affirmed.

Appendix B.

Final Decree Affirming and Enforcing Order to Cease and Desist.

IN THE

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

STANDARD MOTOR PRODUCTS, INC., a corporation, Petitioner, *v.* FEDERAL TRADE COMMISSION, Respondent.	No. 25091

STANDARD MOTOR PRODUCTS, INC., a corporation, petitioner herein, having filed in this Court on March 20, 1958 a petition to review and set aside an order to cease and desist issued against it on December 27, 1957, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Standard Motor Products, Inc., a corporation, Docket No. 5721;" and a copy of said petition having been served upon respondent; and respondent having thereafter certified and filed herein, as required by the Federal Trade Commission Act, a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on February 5, 1959; and this Court having rendered its decision on April 15, 1959, affirming the aforesaid order to cease and desist issued by the Federal Trade Commission, respondent herein;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid petition to set aside the afore-

said order to cease and desist be, and it hereby is, denied; and that petitioner be, and it hereby is, commanded to obey said order and to comply therewith; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that within ninety days after the entry of this decree petitioner shall file with the Federal Trade Commission a report in writing, setting forth in detail the manner and form in which it has complied with said order to cease and desist.

Without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violation of the aforesaid order to cease and desist, hereby enforced, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court:

s/ CHARLES E. CLARK

s/ J. WARREN MADDEN

s/ CARROLL C. HINCKS

Dated: May 4, 1959

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED MAY 4, 1959
A. DANIEL FUSARO, CLERK